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No. 763

WABASH RAILROAD COMPANY, a Corporation,

Petitioner,

vs.

E. F. WILLIAMSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 763

WABASH RAILROAD COMPANY, A CORPORATION,
Petitioner,

vs.

J. F. WILLIAMSON,
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Wabash Railroad Company, a corporation, respectfully petitions for a writ of certiorari to review a final judgment and decision of the Supreme Court of Missouri, the highest court of that state, affirming a judgment for $17,500.00 in favor of respondent and against petitioner, entered in the Circuit Court of Jackson County, Missouri, in an action brought against it by respondent under the Federal Employers' Liability Act as amended August 11, 1939 (45 U. S. C. A. Sec. 51 *et seq.*), 53 Stat. 1404, J. F. Williamson, respondent, *v.* Wabash Railroad Company, appellant, 196 S. W. (2d) 129 (not yet officially reported). Said judgment and decision of the Supreme Court of Mis-

souri became final September 9, 1946, and petitioner has exhausted its remedies in the courts of Missouri.

I

Summary and Short Statement of Matters Involved

(The quoted portions of this statement are from the opinion of the Supreme Court of Missouri, R. 169.)

This action involves the application of the "primary duty rule," the contention of petitioner being that respondent had a positive and primary duty which he failed to perform, resulting in a head-on collision in which he was injured, which failure barred his right to recover, even though others had the same duty, which they failed to perform.

"This is an action under the Federal Employers' Liability Act, filed in the Circuit Court of Jackson County, Missouri. Respondent, J. F. Williamson, obtained a judgment for $17,500 for injuries received by him on account of a collision of two trains operated by appellant, Wabash Railroad Company. From this judgment appellant has duly appealed.

"Appellant's first assignment of error is that the court should have sustained its motion for a directed verdict at the close of all of the evidence.

"The record shows that on April 11, 1944, the crew of appellant's freight train No. 92 consisted of the engineer J. M. Meek, the fireman Ewing, the conductor Carson Adams, the rear brakeman John Hawkins, and the head brakeman, Respondent Williamson. This crew took charge of the train at Stanberry, Missouri, and there they checked their watches. Before the train left Stanberry the crew was given a train order to the effect that passenger train No. 11 would wait at Gallatin until 2:15 A. M. for train No. 92, and that No. 92 should stop at Jameson if it could not reach

Gallatin in time to clear No. 11 by 2:10 A. M., or five minutes before No. 11 was due to leave Gallatin.

"Respondent was sitting on the left side of the engine in the brakeman's seat, which is ahead of the fireman's seat, looking ahead. There are three curves between Jameson and Gallatin at which the speed had to be reduced to 35 miles an hour. When No. 92 got to Jameson respondent looked at his watch and it was 2:05 A. M. As the engineer did not slow down there respondent said to him, 'John, we can't make it.' The engineer replied, 'I've got plenty of time.' Respondent testified that he knew they could not cover the 6.7 miles to Gallatin in time to clear No. 11 by 2:10 as required by the train order. After the above statements between the engineer and respondent nothing further was said between them until respondent called, 'Headlight.' The engineer leaned out of the window to see around the curve and at the same time applied the emergency brake. The other train was then about 100 yards away. When respondent saw the headlight the freight train was on straight track, looking across the inside curve, and No. 11 was on the other side of the curve. The fireman, respondent and the engineer jumped off the engine on the fireman's side. At the time of the collision No. 92 had reduced its speed to about 10 miles an hour and No. 11 had practically stopped. The engineer of No. 11 first saw No. 92 when it was about 700 feet away."

The plaintiff introduced in evidence Wabash rules numbered 863, 865, 99, 106, and 835 (R. 16-17). These rules are quite similar and, in general, provide that the engineer and conductor are responsible for the movement, safety, and proper care of trains.

Petitioner (appellant) admitted that the engineer and conductor of No. 92 were negligent, but contended that respondent violated a positive and independent duty im-

posed on him by the train order and petitioner's Rule 738, which is as follows:

> "'Conductors, trainmen, yardmen, signalmen, operators and others whose duties are connected with the movement of trains, engines or cars, must familiarize themselves with the rules governing the duties of others as well as of themselves and must be prepared, in case of emergency, to act in any capacity to insure safety. The designation "conductors" and "trainmen" in any rule will also include yardmen, when applicable. While general regulations are subdivided for convenience they apply equally to all and must be observed wherever they relate in any way to the proper discharge of the duties of any employe. Trainmen, firemen and yardmen must remind their conductors or engine foremen, and enginemen of the contents of train orders, or the time of superior trains which must be cleared, should there be occasion to do so.'
>
> "Both appellant's and defendant's witnesses testified that at Jameson respondent said to the engineer, 'John, we can't make it.' Respondent contends that he complied with Rule 738 when he made that statement, that he thereby reminded the engineer of the contents of the train order."

In discussing Rule 738, Mr. L. A. High, superintendent of the Moberly division of the Wabash, testified that he had charge of the operation and maintenance of the railroad west of the Mississippi, except the terminals in St. Louis and Kansas City, and of the men who operate the trains; that he is familiar with the rules and with the duties of the men operating the trains; that the duties of a head brakeman are to keep a lookout, to understand train orders, to know what train orders the train has, to know it is moving properly under its orders and that it has a right to move, to protest if orders are violated, to such an extent that necessary action is taken to comply with orders, and to take necessary action to protect the train from accidents and

employees from injury (R. 82-84). In interpreting Rule 738 as to what is an emergency, Mr. High testified to what everybody knows—that if a train is running toward a station and can't make it in time to clear the time of another train, that would be an emergency (R. 85); that a potential head-on collision is an emergency (R. 92); and that as soon as No. 92 passed Jameson and didn't have time to get to Gallatin by 2:10, there was an emergency (R. 94). As to the duty of the head brakeman when such an emergency arose, High testified (R. 85-87) that it was Williamson's duty to have gone over to the engineer and got him to stop the train, and if he couldn't persuade the engineer, he should have set the air, if that was necessary to make the train stop (R. 87). The air valve to stop the train was at the left of the engineer and about five feet from the fireman's side of the cab (R. 64-5), where Williamson was sitting.

In affirming the judgment, the Supreme Court of Missouri held that respondent had complied with Wabash Rule 738 and further, that the emergency contemplated by that rule, requiring action by respondent, was one which arose *only* when a superior employee is *incapacitated* due to sickness, death, or other reasons. In so holding, the court concluded that the "primary duty rule" was not involved, that respondent was not guilty of negligence as a matter of law, and that respondent was entitled to a directed verdict in his favor, without submitting the issue of proximate cause.

It is the contention of petitioner that its motion for a directed verdict (R. 129) should have been given, for the reason that Rule 738 placed a positive and independent duty on respondent to act in emergency in any capacity to insure safety, that an emergency existed, that he failed to act, resulting in his injury, and that, therefore, under the

decisions of this Court, he cannot recover, even though others may also have been negligent in violating the train order and the rule. If the Court does not agree with that contention, it is then the contention of petitioner that petitioner's instruction "A" (R. 133), requiring the jury to find that respondent was guilty of contributory negligence as a matter of law, should have been given, and that the respondent's instruction "1" (R. 129-30), directing a verdict in his favor, should have been refused, because the question of proximate cause of respondent's and petitioner's negligence should have been submitted to the jury.

II

Statement as to Jurisdiction

The jurisdiction of the Court is invoked under Sec. 237 of the Judicial Code as amended by Act of February 13, 1925, Chap. 229, Sec. 1, 43 Statutes 937, U. S. C. A. Title 28, Sections 344(a) and 344(b), to review a final judgment of the Supreme Court of Missouri, rendered in the case of J. F. Williamson, respondent, *v.* Wabash Railroad Company, appellant, No. 39672, 196 S. W. 2d 129 (not officially reported), affirming a judgment in favor of respondent and against petitioner, in the sum of $17,500, rendered by the Circuit Court of Jackson County, Missouri, in an action brought under the Federal Employers' Liability Act as amended August 11, 1939, Title 45 U. S. C. A., Sec. 51 *et seq.*, 53 Statutes 1404. The judgment of the Supreme Court denies petitioner rights which it claimed and to which it was entitled under the Federal Employers' Liability Act.

The Supreme Court of Missouri is the highest court of Missouri in which a decision could be had (Constitution of Missouri, 1945, Article V, Sec. 2). "The Supreme Court shall be the highest court in the state." Article V, Sec. 7,

of the Constitution provides that the Supreme Court may sit *en banc* or in divisions.

On July 8, 1946, Division Two of the Supreme Court of Missouri (to which the case had been previously assigned (R. 168)) filed its opinion and affirmed the judgment of the Circuit Court of Jackson County, Missouri (R. 169).

On July 22, 1946, and within fifteen days, as provided by the rules of the Supreme Court, petitioner (appellant) filed in said Division Two its motion for rehearing or to transfer the cause to the Supreme Court of Missouri *en banc* (R. 178), which motion was overruled September 9, 1946 (R. 188), on which date the judgment became final and petitioner had exhausted its remedies in that court.

The above motion was duly filed, pursuant to the Constitution of Missouri, 1945, Article V, Sec. 9, which provides that a division may transfer a cause to the court *en banc*, and Rules 1.19 and 2.02 of the Supreme Court of Missouri, revised to January 18, 1945, which provide that motions for rehearing and to transfer to the court *en banc* must be filed within fifteen days after the opinion has been filed, and that the two motions may be joined and a rehearing or to transfer may be prayed in the alternative. (Appendix, p. 37).

III

Questions Presented

Under the evidence and the decisions of this Court, did the Supreme Court of Missouri deny petitioner its rights under the Federal Employers' Liability Act:

1. In refusing to determine that respondent had a positive and independent duty, which he violated, resulting in his injury, which violation barred his recovery, even though a superior employee at the same

time and place had the same duty, which he also violated.

2. In its interpretation of Wabash Rule 738, to the effect that respondent had not violated the rule.

3. In directing a verdict for respondent, where the question of proximate cause was an issue in the case,—

(a) With respect to whether or not petitioner's negligence was the proximate cause of respondent's injury.

(b) With respect to whether or not respondent violated a positive and independent duty, resulting in his injury.

(c) With respect to whether or not respondent was negligent in not seeing train No. 11 in time to have caused train No. 92 to stop prior to the collision.

4. In refusing to determine that respondent violated a duty, which entitled petitioner to its instruction "A", declaring respondent guilty of contributory negligence as a matter of law (R. 133).

5. In refusing to remand the case on account of the conduct of respondent's witness Dr. Casebolt.

IV

Reasons Relied On for the Issuance of the Writ

A

The Circumstances

Respondent, under Wabash Rule 738, was required to know (R. 84), and knew, the contents of the train order (R. 22-3), which provided that train No. 92 should stop and wait at Jameson for train No. 11, if No. 92 could not reach Gallatin by 2:10 A. M.; he knew, and stated that he knew

(R. 23), when his train reached Jameson at 2:05 A. M. (R. 23), that it could not reach Gallatin, 6.7 miles away, by 2:10 A. M.; he knew the engineer did not stop at Jameson; he knew a positive train order was violated; under Rule 738, he was required to know the duties of others and to act in emergency, in any capacity, to insure safety; an emergency existed which required action (two trains running in opposite directions on the same track); his duty under the circumstances was to take whatever action was necessary to stop the train. If he could not cause the engineer to stop the train, the means were at hand by which respondent could have stopped it (R. 64-5).

B

The Reasons

1. The opinion of the Supreme Court of Missouri does violence to the opinions of the courts in *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, 73 L. Ed. 224; *Unadilla Valley Ry. Co.* v. *Dibble,* 31 F. 2d 239; *Davis* v. *Kennedy,* 266 U. S. 147, 69 L. Ed. 212; and other cases cited in our brief. These cases pronounce the "primary duty rule" and hold that where two employees, even though one be superior and one inferior to the other, have the same duty, which both violate, neither can recover.

2. The opinion of the Supreme Court of Missouri is in direct conflict with *Unadilla Valley Railway Company* v. *Dibble,* 31 F. 2d 239, decided by the United States Circuit Court of Appeals, Second Circuit. In that case, Dibble, the motorman, and Caldine, the conductor, *who was Dibble's superior,* both violated a "meet order," resulting in a collision. The court held Dibble could not recover, because his act was the primary cause of his injury. This important

question of Federal law should be settled by this Court for the benefit of the public, the courts, and the bar.

3. The dictum of this Court in *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, 63, 87 L. Ed. 610, 615, has caused confusion in the application of the "Primary duty rule," where, in discussing assumption of risk under the Federal Employers' Liability Act, it said:

> "• • • Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. Unadilla Valley R. Co. *v.* Caldine, 378 U. S. 139, 73 L. Ed. 224; 49 S. Ct. 91; Davis *v.* Kennedy, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 22. • • •"

We submit that the "primary duty rule" involves neither contributory negligence nor assumption of risk, and that if the above quotation is to be taken literally, the "primary duty rule" was abolished by the Federal Employers' Liability Act, as amended August 11, 1939.

4. Respondent violated a positive and independent duty, which was the sole cause of his injury, and the opinion of the Supreme Court of Missouri, in holding that petitioner was not entitled to a directed verdict, denied petitioner rights under the Federal Employers' Liability Act and decided this question of substance in a way not in accord with the applicable decisions of this Court, which are set forth in petitioner's brief.

5. The Supreme Court of Missouri in its opinion construed Wabash Rule 738 as meaning that it is *only* when a superior employee is incapacitated, due to sickness, death, or other reasons, that a lower employee is required to act in

emergency to insure safety. This construction reads into the rule something that is not there; there is nothing in the rule which justifies such a narrow construction of the word "emergency" and denies petitioner its rights under the Federal Employers' Liability Act.

6. The Supreme Court of Missouri misconstrued Wabash Rule 738 in holding that respondent had complied with the rule when he said to the engineer, "John, we can't make it," because respondent knew that they couldn't make it and yet he failed to say or do anything further.

7. The direction of a verdict for respondent, without submitting the question of proximate cause, denied petitioner its rights under the Federal Employers' Liability Act.

(a) Under the law and the evidence, the question of petitioner's negligence as the proximate cause of respondent's injuries should have been submitted to the jury.

(b) Under the circumstances above set out, the court should at least have submitted to the jury the question of whether or not respondent's negligence was the proximate cause of respondent's injuries.

(c) Respondent was the only man on the engine in a position to see train No. 11 coming from the opposite direction. He called out, "Headlight," when train No. 11 was 100 yards away, while the engineer of train No. 11, with equal opportunity to see, saw train No. 92 when it was 700 feet away. Train No. 92 had reduced its speed to 10 miles per hour at the time of the collision, and train No. 11 had practically stopped. Under these circumstances, the issue of whether or not respondent was guilty of negligence which was the proximate cause of his injuries should have been submitted to the jury. Instead, the court ignored these circumstances

and directed a verdict for respondent, saying that the issue of proximate cause was not in the case, thus denying petitioner rights to which it was entitled under the Federal Employers' Liability Act.

8. Respondent was guilty of negligence (at least contributory, if not primary) as a matter of law, and the opinion of the Supreme Court of Missouri in upholding the action of the trial court in refusing petitioner's instruction "A" (which was requested after petitioner's motion for a directed verdict was denied) denied petitioner the right to have a jury reduce the damages.

9. Dr. Casebolt, whose testimony as to the severity of respondent's injuries went further than that of any other doctor, denied at the trial (R. 48), that his specialty was gynecology, stated that his listing in the telephone directory under that specialty was a mistake and that he was not responsible for the mistake of the telephone company, and stated that the current telephone book was the first one in which he was so listed. On motion for new trial, it was established that Dr. Casebolt was responsible for the telephone listing, that the mistake in the listing was his mistake and not the mistake of the telephone company, and that most of his work was with surgical diseases of women, care and treatment of women, and obstetrics. Also, the telephone book current at the time of the trial was not the first telephone book in which he was listed as a gynecologist. This conduct of the doctor was prejudicial to petitioner's rights under the Federal Employers' Liability Act, and had a very material effect on the verdict of the jury.

Prayer

Wherefore, petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Missouri, to the end that the judgment

of that court in the cause above mentioned may be reviewed and that upon such review, the decision of that court be reversed, and for such further relief as to this Honorable Court may seem proper.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 763

WABASH RAILROAD COMPANY, A CORPORATION,
Petitioner,

vs.

J. F. WILLIAMSON,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Court Below

The opinion of the Supreme Court of Missouri, in J. F. Williamson, respondent, *v.* Wabash Railroad Company, a corporation, appellant, is reported in 196 S. W. 2d 129 (not yet officially reported).

II

Statement as to Jurisdiction

The judgment of the Supreme Court of Missouri, the highest court of that state, determined rights claimed by petitioner under the Federal Employers' Liability Act as

amended August 11, 1939 (45 U. S. C. A. 51; 53 Stat. 1404), adversely to petitioner. Jurisdiction of this Court is urged under Section 237 of the Judicial Code as amended by an Act of February 13, 1925, Chap. 229, Sec. 1; 43 Stat. 937; U. S. C. A. Title 28, Sec. 344(a) and 344(b).

A more complete statement as to jurisdition and the nature of the case is made under Point II of the Petition for Writ of Certiorari, and will not be repeated here.

III

Statement of the Case

The statement in Point I of the Petition for Writ of Certiorari is adopted here for the sake of brevity.

IV

Specification of Errors

The Supreme Court of Missouri erred in the following particulars:

1. In holding that petitioner was not entitled to a directed verdict in its favor at the close of the evidence, where the evidence established that respondent violated a positive and independent duty to act in emergency to insure safety, which violation resulted in his injuries.

2. In construing Wabash Rule 738 as imposing a duty on respondent to act in emergency to insure safety *only* where a superior employee is *incapacitated* to perform his duties, due to sickness, death, or other reasons, because there is nothing in the rule that places such a narrow construction on the meaning of the word "emergency."

3. In holding that respondent complied with Wabash Rule 738 when he said, "John, we can't make it," because respondent neither said nor did anything thereafter until he saw the headlight of train No. 11, 100 yards away,

although he knew that the train order had been violated and that a collision was imminent.

4. In determining that the trial court properly directed a verdict for respondent without submitting to the jury the question of proximate cause:

(a) With respect to whether or not petitioner's negligence was the proximate cause of respondent's injury.

(b) With respect to whether or not respondent violated a positive and independent duty, resulting in his injury, which was the proximate cause of his injury.

(c) With respect to whether or not respondent's failure to see train No. 11 before it had reached a point 100 yards away was the proximate cause of his injury.

5. In refusing to give petitioner's instruction "A", which required the jury to find that respondent was guilty of negligence as a matter of law, because respondent knew that the train order had been violated, but failed to act in the emergency which existed, as required by Wabash Rule 738.

6. In refusing to order the case remanded because of the prejudicial conduct of Dr. Casebolt at the trial.

Summary of Argument

I

When train No. 92, on which respondent was head brakeman, passed Jameson, he knew that he was violating a train order. He had a positive and independent duty to act in emergency in any capacity to insure safety, under Wabash Rule 738, and his failure to act constituted negligence as a matter of law, which barred his right to recover. The

opinion of the Supreme Court of Missouri to the contrary is in conflict with the following cases:

Unadilla Valley Ry. Co. v. *Caldine,* 278 U. S. 139, 73 L. Ed. 224;

Unadilla Valley Ry. Co. v. *Dibble,* 31 F. 2d 239;

Davis v. *Kennedy,* 266 U. S. 147, 69 L. Ed. 212;

Frese v. *C. B. & Q. R. Co.,* 263 U. S. 1, 68 L. Ed. 131;

Great Northern Ry. Co. v. *Wiles,* 240 U. S. 444, 60 L. Ed. 732;

Van Derveer v. *Delaware L. & W. R. Co.,* 84 F. 2d 979;

Willis v. *Penn. R. Co.,* 122 F. 2d 248.

II

The dictum in *Tiller* v. *Atlantic Coast R. Co.,* 318 U. S. 54, 63, 87 L. Ed. 610, 615, to the effect that under the Federal Employers' Liability Act, contributory negligence, through violation of a company rule, became assumption of risk is misleading and confusing, is in conflict with decisions cited under point I above, and if taken literally, destroys the "primary duty rule."

III

Respondent was not entitled to a directed verdict. The issue of petitioner's negligence as the proximate cause of respondent's injuries should have been submitted, for the following reasons:

(a) Respondent knew that he was violating a train order when he passed Jameson, and yet failed to act in emergency to insure safety, as required by Wabash Rule 738. In view of those facts, the question of petitioner's negligence as the proximate cause of respondent's injuries should at least have been submitted to the jury.

(b) Respondent, with the same opportunity to see train No. 11 as the engineer of train No. 11 had to see train No. 92,

and with the duty on respondent to be on the lookout, did not see No. 11 until it was 300 feet away, while the engineer of No. 11 saw No. 92 when it was 700 feet away. No. 11 had practically stopped at the time of the collision, and the speed of No. 92 had been reduced from 30 miles per hour to 10 miles per hour. Because of these facts, the question of petitioner's negligence as the proximate cause of respondent's injuries should have been submitted to the jury.

(c) Under the Federal Employers' Liability Act, the carrier's negligence must be the proximate cause of the employee's injuries.

Lang v. *N. Y. Central R. Co.*, 255 U. S. 455, 65 L. Ed. 729;

St. Louis & S. F. R. Co. v. *Conarty*, 238 U. S. 243, 59 L. Ed. 1290;

Hylton v. *Southern Ry. Co.*, 87 F. 2d 393 (Cert. denied, 301 U. S. 609).

IV

Respondent was guilty of negligence (at least contributory) as a matter of law, and the court's failure to so instruct deprived petitioner of the right to have the jury reduce the damages, as provided by the Federal Employers' Liability Act.

(Authorities under Point I.)

V

Dr. Casebolt, whose testimony as to the severity of respondent's injuries went further than that of any other doctor, denied at the trial (R. 48) that his specialty was gynecology, stated that his listing in the telephone directory under that specialty was a mistake and that he was not responsible for the mistake of the telephone company, and stated that the current telephone book was the first one in

which he was so listed. On motion for new trial, it was established that Dr. Casebolt was responsible for the telephone listing, that the mistake in the listing was his mistake and not the mistake of the telephone company, and that most of his work was with surgical diseases of women, care and treatment of women, and obstetrics. Also, the telephone book current at the time of the trial was not the first telephone book in which he was listed as a gynecologist. This conduct of the doctor was prejudicial to petitioner's rights under the Federal Employers' Liability Act, and had a very material effect on the verdict of the jury.

ARGUMENT

I

The Supreme Court of Missouri in its interpretation of Wabash Rule 738 in effect destroyed the "Primary Duty Rule" and its opinion is in conflict with the opinions of this Court and of the United States Circuit Courts of Appeal.

Freight train No. 92 left Stanberry in charge of a crew of five men. Respondent, as head brakeman, was a member of that crew. Each member, under Rule 738, was required to know the contents of train orders, the duties of other members of the crew, and to act in case of emergency, in any capacity, to insure safety (R. 84). The duty of each was independent and primary. Respondent knew the contents of the train order, as was required of him (R. 22). That order provided that No. 92 should stop and wait at Jameson for train No. 11, if No. 92 could not reach Gallatin by 2:10 A. M. Respondent knew, and admitted that he knew, when his train reached Jameson at 2:05 A. M. (R. 23), that it could not reach Gallatin, 6.7 miles away, by 2:10 A. M.; he knew the engineer did not stop the train at Jameson; he knew a positive train order was violated; under Rule 738,

he was required to act in emergency, in any capacity, to insure safety; an emergency existed which required action (two trains running in opposite directions on the same track); his duty under the circumstances was to take whatever action was necessary to stop the train. If he could not cause the engineer to stop the train, the means were at hand by which respondent could have stopped it (R. 64-5).

Under these facts, the "primary duty rule" as announced in *Unadilla Valley Ry. Co.* v. *Caldine*, 278 U. S. 139, 73 L. Ed. 224, and *Unadilla Valley Ry. Co.* v. *Dibble*, 31 F. 239, should have been applied. These cases involved the same accident. In the *Caldine* case, plaintiff's intestate was a conductor on a gasoline-driven suburban passenger car. Dibble, the motorman, was the only other member of the crew. As in the case at bar, it was the duty of both, as members of the crew, to know the contents of train orders. Both Caldine, the conductor, and Dibble, the motorman, permitted the car to leave the station in violation of an order which required them oo wait until another train had passed. In the ensuing collision with the opposing train, the conductor was killed. In reviewing the judgment obtained by plaintiff in the New York courts, in the *Caldine* case, this court held that Caldine was negligent and that, *although the motorman may have been negligent also*, yet the conductor, who knowingly violated such an order, could not recover.

In the *Dibble* case, the engineer, who was a lower employee than Caldine, the conductor, also brought suit against the railroad. Dibble was denied recovery, even though Caldine, the conductor, was negligent in violating the same order.

The theory of these cases is that, where two or more men have the same positive duty to perform, and both fail to perform it, one who knows of the other's failure cannot recover, even though the other may be his superior. The negligence

of the one does not contribute to the negligence of the other; each is directly responsible, and the law will not permit either to recover.

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212;
Frese v. *C. B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131.

Neither contributory negligence (*Van Derveer* v. *Delaware L. & W. R. Co.*, 84 F. 2d 979, l. c. 981), nor assumption of risk is involved (*Willis* v. *Penn. R. Co.*, 122 F. 2d 248, l. c. 249) in the application of the "primary duty rule."

In the case at bar, each member of the crew, at the time in question, had the positive duty not to pass Jameson. Respondent cannot excuse his failure to perform that duty by saying that another also failed.

The Supreme Court of Missouri, while recognizing the doctrine as announced in the above cases, destroyed the effect of those decisions by its interpretation of Wabash Rule 738. That rule is as follows: (R. 84-5)

> "Conductors, trainmen, yardmen, signalmen, operators and others whose duties are connected with the movement of trains, engines or cars, must familiarize themselves with the rules governing the duties of others as well as of themselves and must be prepared, in case of emergency, to act in any capacity to insure safety. The designation 'conductors' and 'trainmen' in any rule will also include yardmen, when applicable. While general regulations are subdivided for convenience they apply equally to all and must be observed wherever they relate in any way to the proper discharge of the duties of any employe. Trainmen, firemen and yardmen must remind their conductors or engine foremen, and enginemen of the contents of train orders, or the time of superior trains which must be cleared, should there be occasion to do so."

The Missouri Supreme Court held, first, that respondent had complied with Rule 738 when he said, "John, we

can't make it"; and, second, that under Rule 738, it is only when an employee is *incapacitated* to perform his duties, due to sickness, death, or other reason, that an emergency requiring action by a lower employee to insure safety arises.

Rule 738 is clear and unambiguous, and the construction of it by the Missouri court cannot be supported. The first sentence in the rule requires any employees "whose duties are connected with the movement of trains" to "familiarize themselves" with the duties of others engaged in the movement of trains and "be prepared, in case of emergency, to *act* in *any capacity* to insure safety."

Clearly this part of the rule calls, in case of *emergency*, for something more than merely *reminding* others of the contents of train orders or the time of superior trains, as is required in the last sentence of the rule. A great many occasions can and do arise in railroading where one employee should remind another of some order or schedule which, apparently, he may have overlooked, and by this portion of the rule, this lesser duty is confined to *train orders* and *schedules*. This is a duty to caution before an emergency arises. The first sentence in the rule applies as soon as the emergency *arises* and the clear literal intent and meaning of the rule requires one to *act* by performing *any* duty of one who for *any* reason is not performing his duty and has created an emergency.

When respondent said, "John, we can't make it," and the engineer replied, "I've got plenty of time," respondent knew, and admitted that he knew, that they couldn't make it. If under these circumstances it can be said that respondent complied with that portion of the rule which required respondent to call the engineer's attention to train orders, nevertheless, his positive duty under the rule did not end there. He knew it was the engineer's duty to stop the

train at Jameson, he knew that the engineer did not do so, and he knew that they could not make it to Gallatin by 2:10 A. M. Right then an emergency arose and it was respondent's positive duty to act in any capacity in insure safety. He admitted that he knew that the train order had been violated. The train was headed for a certain collision if he did not act. He didn't remonstrate; he didn't ask the engineer how much time he had. He did nothing, when he had a duty to act.

In its construction of Rule 738 in regard to what constitutes an emergency requiring action to insure safety, the Missouri court, in its opinion, said: (R. 171-2)

> "It is *obvious* that this rule (referring to Rule 738) means that if an employe is *incapacitated* to perform his duties due to sickness, death or other reasons, the next lower employe should step in and take over the *incapacitated* employe's duties." (Italics ours.)

There is nothing in the rule which requires that a superior must be *incapacitated* before there is an emergency which requires action by a lower employee. Why is it "obvious" that the rule means that? The purpose of the rule is, as it expressly states, to insure safety. To insure safety, each member of the crew must know the duties of the other members. For what purpose? So that he may act in the performance of those duties, in emergency, in any capacity, to insure safety. Why does it make any difference whether one or more of the members of the crew fail to perform their duties due to incapacity or negligence? It is to be prepared to meet an emergency that the rule requires knowledge of the duties of others and, when an emergency arises, requires action in any capacity to insure safety, no matter from what cause the emergency arose. With all due respect to the Missouri court, this construction of the rule seems to us to be the "obvious" one, and not

the construction placed on the rule by that court, which limits an "emergency" to one that has arisen solely from incapacity of some other employee. The court's construction reads into the rule something that is not there.

The duty to operate trains safely is on the company. The company must perform that duty through men. These men are human and one of them may make a mistake. That is why the duty is placed on each member of the crew to know the duties of others and be prepared to act in emergency in any capacity to insure safety.

Take the case of a truck stalled on the track in front of an oncoming train. The fireman is putting in a fire. The engineer is negligently looking the other way. The head brakeman, sitting where respondent was sitting in the case at bar, sees the truck stalled on the track and calls out, "Stop the train; there's a truck stalled on the track." The engineer says, "No, there isn't," and the brakeman knows that there is. Could it be said that there is no emergency requiring action under the rule? How much more of an emergency exists when one train is running on the time of another, and in the opposite direction! In the latter case, the lives of dozens are at stake. The greatest emergency in railroading exists. Action is required. If no action, a wreck; if action, safety.

The opinion of the Missouri court in its interpretation of Wabash Rule 738 has nullified the "primary duty rule", has denied petitioner its rights under the Federal Employers' Liability Act, and is in direct conflict with the *Unadilla* cases and other cases cited.

II

The Dictum of this Court in Tiller v. Atlantic Coast Line, 318 U. S. 54, 63, 87 L. Ed. 610, 615, in a case not involving the "Primary Duty Rule," to the effect that under the Federal Employers' Liability Act, contributory negligence through violation of a company rule became assumption of risk, is misleading and confusing and if taken literally, destroys the "Primary Duty Rule."

The opinion of this Court in *Tiller* v. *Atlantic Coast Line,* 318 U. S. 54, 63, 87 L. Ed. 610, 615, has caused confusion in the application of the "primary duty rule" when, in discussing assumption of risk under the Federal Employers' Liability Act, it said:

> "• • • Aside from the difficulty of distinguishing between contributory negligence and assumption of risk many other problems arose. One of these was the application of the 'primary duty rule' in which contributory negligence through violation of a company rule became assumption of risk. Unadilla Valley R. Co. *v.* Caldine, 278 U. S. 139, 73 L. Ed. 224, 49 S. Ct. 91; Davis *v.* Kennedy, 266 U. S. 147, 69 L. Ed. 212, 45 S. Ct. 22. • • •"

The very foundation of the "primary duty rule" is that it does not involve contributory negligence or assumption of risk. The rule is that, where an employee has a positive duty to perform and fails to perform it, resulting in his injury, he cannot recover, even though other employees may have had the same duty, which they failed to perform. It is his negligence which bars his recovery. The negligence of others has nothing to do with the matter. Their negligence is not contributory, nor is there any question of assumption of risk. His negligence is the "sole cause" of his injury.

Unadilla Valley Ry. Co. v. *Caldine,* 278 U. S. 139, 73 L. Ed. 224;

Unadilla Valley Ry. Co. v. *Dibble,* 31 F. 2d 239;

Davis v. *Kennedy*, 266 U. S. 147, 69 L. Ed. 212;
Frese v. *C. B. & Q. R. Co.*, 263 U. S. 1, 68 L. Ed. 131;
Van Derveer v. *Delaware L. & W. R. Co.*, 84 F. 2d 979, 981;
Willis v. *Penn. R. Co.*, 122 F. 2d 248, 249.

The above dictum in the *Tiller* case is confusing to the public, the bench, and the bar, and is not supported by the decisions of this Court given as authority for the statement.

We submit that the Court should take this case, clarify the Court's statement in the *Tiller* case, and settle the conflict which exists in the decisions of the courts in the application of the "primary duty rule."

III

The Supreme Court of Missouri erred in upholding respondent's instruction "1", directing a verdict for respondent, because the issue of proximate cause of petitioner's negligence should have been submitted to the jury.

The Supreme Court of Missouri held that the giving of respondent's instruction "1" was proper.

In so holding, the Missouri court (R. 173) said that under the Federal Employers' Liability Act, since petitioner admitted negligence of its conductor and engineer, this admission made appellant liable in damages for respondent's injuries, even though respondent may have been negligent, unless his negligence was the direct and primary cause of his injuries; that under the evidence and the court's interpretation of Wabash Rule 738, the respondent did not violate the rule; in effect saying that as a matter of law respondent's conduct did not constitute direct and primary negligence on his part which was the cause of his injuries.

Under the authorities cited under point I of our argument, if it was established beyond dispute (1) that plaintiff had the train order and understood it; (2) that he knew

when the train passed Jameson that he was violating a positive train order (he admitted that he knew they couldn't reach Gallatin by 2:10 A. M.); (3) that under Rule 738, plaintiff was required to act in an emergency; (4) that an emergency existed which required action; (5) that his duty under those circumstances was to take whatever action was necessary to stop the train; (6) that the means were at hand by which he could stop the train; and (7) that he didn't cause the train to stop; then, plaintiff's negligence barred his recovery. Our position under point I is that those facts were established beyond dispute and that, therefore, defendant's motion for a directed verdict should have been granted.

If, however, the Court does not agree with our position under point I, nevertheless, there is certainly evidence in the case of the above facts, and if they are true, they bar plaintiff's right to recover. That being so, a directed verdict should not have been given for the respondent. The question of petitioner's negligence as the proximate cause of respondent's injuries should have been submitted to the jury.

Under the Federal Employers' Liability Act, before an injured employee can recover, it is necessary that the carrier's negligence be the proximate cause of his injury.

Lang v. *N. Y. Central R. Co.*, 255 U. S. 455, 65 L. Ed. 729;

St. Louis & San F. R. Co. v. *Conarty*, 238 U. S. 243, 59 L. Ed. 1290;

Hylton v. *Southern Ry. Co.*, 87 F. (2d) 393 (Cert. denied, 301 U. S. 609).

Failure of Respondent to Keep a Vigilant Lookout as the Proximate Cause of His Injuries

There is one other question of proximate cause in the case, and that is—whether or not respondent's failure to see

train No. 11 until it was 100 yards away, when the engineer of No. 11, with equal opportunity to see, saw No. 92 when it was 700 feet away, was the proximate cause of his injuries. Respondent was on the fireman's side of the engine cab, with the duty to look ahead, and in this case that duty was more pronounced because he knew they were violating a train order. He failed to see No. 11 until it was 100 yards away. Even then, the speed of No. 92 was reduced to 10 miles an hour at the time of the collision. His duty was to look out. He was on the inside of the curve and was the only one on the engine of No. 92 who was in a position to see the approach of No. 11. The engineer of No. 11, who had equal opportunity to see across the curve, saw No. 92 when it was 700 feet away, immediately applied his air, and brought his train practically to a stop at the time of the collision. If respondent had seen No. 11 when it was 700 feet away, as he could and should have, since the engineer of No. 11, with equal opportunity to see, saw No. 92 that far away, instead of 300 feet, the question of whether or not the two trains would both have been stopped before the collision was a question for the jury. In view of this situation, at least the question of petitioner's negligence as the proximate cause of whatever injury respondent may have received, should have been submitted.

The Missouri court held that petitioner did not try the case on the theory that respondent failed to perform his lookout duty. In this we believe the court was in error, and that petitioner was deprived of its rights under the Federal Employers' Liability Act. The court overlooked the following:

1. The answer contained a general denial, which puts the question of proximate cause in issue (R. 6).

2. The answer also, under the plea of contributory negligence, pleaded that although plaintiff (respondent) "knew

or could have known the dangers of a collision, . . . he failed to cause the train on which he was riding to stop or slow down in time to avoid said collision; he failed to keep a reasonable and sufficient lookout; and jumped off the train before said collision occurred." While contributory negligence, in and of itself, would not bar recovery, this plea in the answer shows that petitioner was making the contention that the respondent failed to keep a lookout, failed to stop the train, and jumped off the train before the collision occurred.

3. Respondent testified that he was looking ahead, saw the headlight of No. 11, and called to the engineer, who immediately applied the air (R. 16).

4. On cross-examination of respondent, petitioner proved that it was the respondent's duty to look out and warn the engineer of any danger to the train (R. 24).

5. Petitioner proved, through engineer Meek, who testified that when respondent called "Headlight!", No. 11 was 100 yards away (R. 65).

6. Petitioner then proved by engineer Guitar that when he first saw No. 92, it was 700 feet away (R. 75).

7. Petitioner also proved that the speed of No. 92 was reduced from 30 miles an hour (R. 65) to 10 miles an hour at the time of the collision (R. 66) and that train No. 11 had practically stopped at the time of the collision (R. 75).

8. Petitioner objected to respondent's peremptory instruction because it didn't submit the issue of proximate cause to the jury.

The answer put the question of proximate cause in issue and the evidence and objections, as above set out, went directly to the issue of proximate cause. When respondent first saw No. 11 only 100 yards away, while the engi-

neer of No. 11, with the same view, saw No. 92 700 feet away, and where one of the trains had practically stopped and the other had reduced its speed to 10 miles an hour, it became a very material issue in the case as to whether or not, if the respondent had kept a proper lookout and had thus seen No. 11 when 700 feet away, the collision would have occurred.

IV

The opinion of the Supreme Court of Missouri in holding that respondent was not negligent as a matter of law denies petitioner its rights under the Federal Employers' Liability Act.

After petitioner's motion for a directed verdict was denied, petitioner asked that its instruction "A" be given, finding respondent guilty of contributory negligence as a matter of law. The Missouri court held that this instruction was properly refused, for the same reasons that it held that petitioner's motion for a directed verdict was properly denied, namely that respondent had complied with Wabash Rule 738.

What we have said with reference to the court's interpretation of this rule, under point I of the argument, applies equally here. Under both points, we contend that respondent was guilty of negligence as a matter of law. Under point I, we say that his negligence was primary and bars his right to recover. If the Court should disagree with us on that point, we say that at least his negligence was contributory as a matter of law.

Respondent, with the duty to keep a lookout (R. 62-3), was also guilty of negligence as a matter of law because he failed to see No. 11 until it was 100 yards away (R. 65), while the engineer of No. 11, with equal opportunity to see,

saw No. 92 when it was 700 feet away (R. 75). At the time of the collision, No. 11 had practically stopped (R. 75), having reduced its speed from 30 miles per hour (R. 77), from the time its engineer first saw No. 92. The speed of No. 92 had been reduced from 30 miles per hour, when No. 11 was 100 yards away, to 10 miles per hour at the time of the collision (R. 65-6). Respondent failed to see, when it was his duty to see. The evidence is uncontradicated that he could have seen No. 11 when it was 400 feet further away than when he did see it, because that is when the engineer of No. 11 saw No. 92.

Respondent was guilty of negligence as a matter of law, and it was error to refuse petitioner's instruction "A."

V

The Missouri Court erred in not sustaining defendant's motion for new trial on account of the mistake or perjury of respondent's doctor, M. B. Casebolt.

Respondent's witness Dr. Casebolt, on cross-examination, testified as follows: (R. 48)

"Q. You are not an orthopedic physican?

A. No, sir.

Q. Do you have a specialty?

A. My work is general surgery.

Q. Do you have any particular specialty, Doctor?

A. No, sir.

Q. Aren't you listed in the telephone book as a gynecologist?

A. Yes, sir; that got in there by mistake.

Q. That means a physician who specializes in the diseases of women?

A. Yes, sir.

Q. That means a child doctor, a doctor for childbirth?

A. Yes, sir.

Q. And venereal diseases?
A. Yes, sir.

• • • • • • •

(Redirect examination by Mr. Trusty.)

Q. You have been listed for years and years in your regular business as a general practitioner and surgeon?
A. Yes, sir.
Q. You are not responsible for the way the telephone company listed you?
A. No, sir.
Q. (Mr. Sebree) Is that the first telephone book in which you were so listed?
A. (The witness) Yes,sir."

As a matter of fact, the doctor's listing under the specialty "Gynecology-Obstetrics" in the telephone book was at his own instance, and was not a mistake of the telephone company; the December, 1944, telephone book, which was current at the time of the trial, was not the first book in which he was listed under that specialty; and most of his work for the last few years has been given to surgical diseases of women and to the care and treatment of women, and to obstetrics.

These facts were brought out in the depositions of William H. Bartleson, executive secretary of the Jackson County Medical Society (R. 147-8) and of Dewey H. Colton, directory sales supervisor of the Southwestern Bell Telephone Company (R. 152), taken by defendant in support of its motion for new trial, and attached to it; and by the affidavit of Sam B. Sebree (R. 162) and the counter-affidavit of Dr. Casebolt (R. 162).

On motion of respondent, the depositions were struck from the record by the court, but the court acted on the

Sebree affidavit, which incorporated the depositions by reference, and on the Casebolt affidavit.

Dr. Casebolt is not an orthopedic surgeon, and so far as the record shows, he did not examine the x-rays; nevertheless, his testimony as to the extent of respondent's injuries went further than that of any other witness. For that reason his credibility becomes most important. In his testimony at the trial, he stated that his specialty listing in the telephone book under gynecology got in there by mistake; that he could not help the way the telephone directory listed him; and that the current telephone book, December, 1944, was the first one in which he was so listed (R. 48-9). As a matter of fact, from the way the telephone company list was prepared, as shown by the Sebree affidavit on the motion for new trial, and which was not denied in the Casebolt affidavit, he was requested by the Jackson County Medical Society and the telephone company to state how he wished to be listed, and replied either by postal card or by telephone that he wished to be listed under the classification "Gynecology-Obstetrics." He was listed under that classification in the June, 1944, telephone book; in the December, 1944, book, which was current at the time of the trial; and he was also so listed in the June, 1945, telephone book, which came out on June 1, 1945, a few days after the trial.

His statements were not true, and since his testimony was the most damaging to petitioner on the respondent's injuries, his credibility is most material. His own affidavit (R. 163), which respondent filed in opposition to the motion for new trial, convicts him. In the affidavit, he says that the mistake to which he referred in his testimony was his own mistake in allowing himself to be listed as a gynecologist and yet, in his cross-examination at the trial, in response to the question by Mr. Trusty: "You are not responsible for the way the telephone company listed you?", he answered, "No, sir." Also in his affidavit he admitted that for the

last few years most of his work had been given to surgical diseases of women, to the care and treatment of women, and to obstetrics. In his affidavit, he attempts without success to avoid his statement that the current telephone book was the first in which his specialty was listed as "Gynecology-Obstetrics." The current book at the time of the trial was the December, 1944, book, which was replaced on June 1, 1945, by the June, 1945, book, but he had also been listed under the classification of "Gynecology-Obstetrics" in the June, 1944, book.

Five doctors gave evidence in the case. Dr. Handlor, who treated respondent at the hospital for his injuries (R. 31), Dr. Campbell (R. 95) and Dr. Casebolt (R. 42), for the respondent; and Dr. Stone (R. 104) and Dr. Schauffler (R. 117) for petitioner. Dr. Handlor, Dr. Stone and Dr. Schauffler all stated that in their opinion respondent was not permanently injured. Dr. Campbell testified that in his opinion, respondent had an injured vertebral disc between the fifth lumbar and the first sacral vertebrae, which in the majority of cases would be relieved by an operation. He did not testify to what extent respondent was incapacitated, nor did he testify that an operation would be dangerous. Dr. Casebolt found respondent's injury in the region of the fourth and fifth lumbar vertebrae, and stated that the injury was permanent and that an operation had one chance in three of success.

Dr. Casebolt was not fair to the jury, his conduct was prejudicial to petitioner's rights, and such a large verdict should not be permitted to stand on his testimony, as it denies petitioner its rights under the Federal Employers' Liability Act.

Conclusion

We urge the Court to grant this writ for the reasons above set out. The Missouri court has clearly misinter-

preted Wabash Rule 738, and in so doing has deprived petitioner of its rights under the Federal Employers' Liability Act.

Respectfully submitted,

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APPENDIX

Rules of the Supreme Court of Missouri

1.19—Motions for Rehearing. Motions for rehearing shall briefly and distinctly state the grounds upon which a rehearing is sought. They may be accompanied by suggestions in support containing citation of authorities. Such motion must be filed within fifteen days after the opinion of the court shall be filed, and the motion and suggestions must be served on the adverse party or his attorney within said time. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court.

The sole purpose of a motion for rehearing is to call attention to material matters of law or fact overlooked or misinterpreted by the court, as shown by its opinion. Mere reargument of issues determined by the opinion will be disregarded.

If desired, suggestions in opposition to a motion for rehearing may be filed within ten days after the expiration of the time for filing of such motion, and a copy of such suggestions shall be served on the adverse party or his attorney within said time.

2.02—Transfer to the Court en Banc. A motion to transfer a cause under the provisions of the Constitution from either Division to the Court en Banc must be filed within fifteen days after the opinion of the court shall be delivered in Division and notice of the filing thereof must be served on the adverse party, or his attorney. A motion to transfer to the Court en Banc may be joined with a motion for rehearing and a rehearing or transfer may be prayed for in the alternative.

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In the Supreme Court of the United States

October Term, 1946.

WABASH RAILROAD COMPANY, a corporation, *Petitioner,*

vs.

J. F. WILLIAMSON, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 763.

STATEMENT OF THE CASE.

Respondent feels that petitioner's statement is not sufficiently complete in all respects and supplements it by the following statement:

This is an action under the Federal Employers' Liability Act for personal injuries sustained by respondent, a head brakeman (hereinafter called plaintiff), when he jumped off one of petitioner's (hereinafter called defendant's) locomotives just before a head-on collision with another of defendant's locomotives on defendant's single track main line between Jameson and Gallatin, Missouri. The negli-

gence of the engineer and conductor of the train was admitted by defendant (R. 126). A verdict was returned by a jury in the trial court in the sum of $22,500.00 (R. 6). Thereafter said verdict was reduced by the trial judge to $17,500.00, and judgment entered thereon (R. 6 and 7). Thereafter, the cause was appealed by defendant to the Supreme Court of Missouri and upon hearing was affirmed by said court (R. 169-177). Timely motion for rehearing or to transfer the cause to the court *en banc* was filed by the defendant and was overruled (R. 178-188). From the rulings of the Supreme Court of Missouri, defendant seeks to have this Court grant a writ of certiorari.

The main point at issue before this Court is the question of whether the Supreme Court of Missouri placed a proper interpretation upon Rule 738 of the defendant, Wabash Railroad, said petitioner herein claiming that this rule placed the positive affirmative duty upon respondent, the head brakeman, of going over the head of the engineer and fireman by force, if necessary, and stopping the train.

Plaintiff was head brakeman on the crew of regularly scheduled freight train No. 92, operating from Iowa eastward through Missouri. The crew of which he was a member took charge of the train at Stanberry, Missouri, and consisted of J. M. Meck, an engineer of some 25 years' experience; Carson Adams, a conductor of years' experience; Mr. Ewing as fireman, John Hawkins as rear brakeman, and himself as head brakeman (R. 8-10, 49, 58, 59). Plaintiff's experience had been confined to acting as brakeman, never having acted as fireman or engineer. He had nothing to do with operating the engine or directing the engineer or fireman (R. 10, 12, 22).

Rules of defendant railroad company were introduced in evidence by plaintiff. Rule 865 provides that both passenger and freight conductors "are responsible for the

movement, safety and proper care of their train, and for the vigilance and conduct of the men employed thereon." Rule 99 provides that, "Conductors and enginemen are responsible for the protection of their trains." Rule 106 provides, "Both the conductor and the enginemen are responsible for the safety of the train and the observance of the rules, and, under conditions not provided for by the rules, must take every precaution for protection." Rule 835, applying to enginemen, provides, "They are jointly and equally responsible with conductors for the movement and protection of their trains, in accordance with the rules, but will be governed by the directions of conductors in the general handling of their trains, unless so doing would endanger their safety or require violation of the rules. When there is no conductor, they will have charge of the train and will be governed by the rules prescribed for conductors" (R. 16-17).

Pertinent parts of Rule 738, introduced by defendant, require men whose duties are connected with the movement of trains to "familiarize themselves with the rules governing duties of others as well as themselves and to be prepared, in case of emergency, to act in any capacity to insure safety." It further provides, "Trainmen, fireman and yardmen must remind their conductors or engine foremen and enginemen of the contents of the train orders, or the time of superior trains which must be cleared should there be occasion to do so" (R. 84-85).

Plaintiff testified that the conductor, engineer and fireman were "over him" (R. 15). The conductor had control of the operation of the train (R. 50, 73). Engineer Meck testified on behalf of defendant that he was in charge of the operation of the engine and the air valve, and the fireman was next in charge of the engine (R. 68). It was the fireman's duty to fire the engine, look out around curves,

watching the train, and to call the engineer's attention to train orders if he weren't complying with them (R. 63). It was the head brakeman's duty to look out for the safety of movement of the train, to look back and watch the train around curves, and call his attention to unsafe factors and anything he was overlooking (R. 62-63). L. A. High, superintendent of the defendant's Moberly division, testified for defendant that the conductor has general charge of the train, directs its movements, sees that the orders are proper and all members of the crew understand the orders alike; that the engineer is charged with the proper handling of the train under the instructions of the conductor, the handling of train orders, the observation of signals and the supervision of the fireman on the engine and others that are in contact with him; that it is the head brakeman's duties to frequently inspect the train while running, keep a general lookout ahead for signals, understand train orders, follow the direction of the conductor, and know what orders the train is moving under and that it is moving properly under orders (R. 82-83). The conductor has an air valve in the caboose with which he can slow or stop the train, the same as the engineer (R. 10, 50).

As the crew took over the train at Stanberry, all five members compared their watches with the standard time clock there. Each member of the crew except plaintiff was furnished a copy of train order No. 11, with address and text as follows:

> "To C. & E. No. 92
> No. 14
> No. 11 Eng. 698 wait at Gallatin until 2:15 a. m. Jameson until 2:35 a. m. for No. 92 Eng. 2063 No. 14 Eng. 699 Run 15 mins. late Stanberry to Gallatin (Signed) L. K. B. Conductor and Engineman must both have a copy of this order" (R. 13).

They all read the order together. It meant that regularly scheduled westward bound passenger train No. 11 was late and would wait for them at Gallatin until 2:15 a. m., and at Jameson until 2:35 a. m. This meant that their freight train must be in the clear at Gallatin by 2:10 a. m. if it was to meet the passenger train at that station. No. 11 was a first-class train and had a right to leave Gallatin at the time set out and go to the next place, which was Jameson. If the passenger train had not been late, the meeting point would have been at Jameson (R. 11, 12, 22, 23, 60, 61).

The time train 92 left Stanberry was not fixed. After leaving Stanberry, the train stopped at Darlington, Missouri, for the Burlington crossing, and at Pattonsburg to take coal and water. They left Pattonsburg at 12:49 (R. 9, 60). The west switch onto the sidetrack at Jameson is west of the station, and the east switch about 15 car lengths east of the station (R. 70). The sidetrack at Gallatin starts west of the station and runs west approximately a half mile (R. 50, 51, 70). It is 6.7 miles from the station at Jameson to the station at Gallatin. There are three curves between Jameson and Gallatin, the first about a mile and a half from Jameson, the second about four miles, and the third about a mile and a quarter from Gallatin. The last two were slow order curves with a 30-mile speed limit (R. 24, 25, 65). The track is straight with no obstruction for a mile west of Gallatin (R. 51).

As the train approached Jameson, plaintiff was sitting on the left side of the cab beside the boiler, the fireman was sitting behind him and the engineer was sitting on the right side of the cab (R. 14). As the train was approaching the west switch at Jameson, the engineer did not slow down or stop, and the conductor did not attempt to slow down or stop. Plaintiff looked at his watch and saw that it was 2:05 a. m. and called to the engineer and

said, "John, we can't make it." The engineer looked at his watch and said, "I've got plenty of time. We can make it easy." The fireman looked at his watch and put it back in his pocket without saying anything, and got down and started to put in a fire, and the conductor did nothing about pulling the air (R. 14, 23, 24, 60, 61). When plaintiff spoke to the engineer, there was time to slow down or stop and go onto the side track at Jameson (R. 70). There was no speedometer on the engine, but plaintiff estimated their speed at about 50 miles an hour (R. 13-15), and the engineer at 40 miles per hour (R. 60). When the engineer told plaintiff he had plenty of time, and the fireman looked at his watch and got down to fire the engine, and the conductor did not put on the air, and he saw their speed, the plaintiff thought that they would make it all right because they were "over him", and there was nothing he could have done with the engine (R. 15). About a mile before the accident the engineer slowed down for the third curve, although in all probability he would have made it to the switch on the west side of the Gallatin station if he had not slowed down (R. 15-16). Plaintiff was sitting in his seat in the cab looking ahead, and they were on the straight part of the track going into the last curve when he saw a reflection of the headlight of passenger train No. 11 on the east side of the curve, and yelled "headlight" to the engineer, who leaned out, saw the light and immediately applied his air and the train began to slow down. The fireman jumped off, and plaintiff got off his seat and came back and unhooked a canvass curtain between the tank and cab on the left side, turned around, backed down the steps, and swung off, and was thrown to the ground and injured. The engineer followed him off the engine (R. 12-16, 65-66). Their engine was going about ten miles per hour at the time the engines collided (R. 66).

J. M. Meck, the engineer of No. 92, testified that as they approached the west switch at Jameson, Williamson said, "You can't make it," or "Can you make it, John?" And he looked at his watch and misread it and figured it was 2:03, and said, "Oh, yes, we can make it easy"; and plaintiff and the fireman looked at their watches (R. 60-61). He admitted that if it had been 2:03 he couldn't have gotten into Gallatin by 2:10, but would have gotten clear by 2:14 (R. 83). He conceded that even if the time had been correct he would have been encroaching on the time of No. 11 without authority (R. 72-73).

The engineer testified that the head brakeman had "no duty only just to sit there and look out", and to call his attention to something he was overlooking (R. 63). After plaintiff had called his attention to the order and told him he couldn't make it, and he said that he had plenty of time, plaintiff's only other duty was to "reach for a fusee and prepare himself for the duty of flagging in the event of an accident" (R. 63-64). He (the engineer) was in charge of the locomotive and the air valve, and if anything became the matter with him the fireman was next in charge (R. 68). He never asked the fireman or Williamson what their watches said (R. 68-69). When there is going to be a collision, "you get off the engine to save your life", and that has been done for years (R. 69). It did not dawn on him that he had misread his watch until after the collision when he got back and talked to the conductor (R. 71). When he said that he had plenty of time the fireman *should* have said, "You can't make it, John", and even the brakeman could have said that (R. 71). The fireman "could have called his attention or he could have set the air brake, if necessary, and the brakeman could have done the same thing *if he wanted to*" (R. 73).

Defendant railroad held a hearing at which all the facts of the collision were fully inquired into. The defendant measured the fault of all the men and took into consideration the superior duty of the engineer and conductor, and punished them by discharging them from the service, while it gave the plaintiff a thirty-day suspension (R. 58, 68, 89-91).

SUMMARY OF ARGUMENT.

I.

The Supreme Court of Missouri placed a proper interpretation upon Wabash Rule 738 in holding that respondent performed his duty under that rule when he called the engineer's attention to the train order and the engineer understood and replied that he had "plenty of time to make it." The Missouri court properly held that the rule did not require respondent to usurp the authority of his superiors in charge of the train and take over and stop the train by physical force, if necessary. Since petitioner admitted that the conductor and engineer were negligent, and since respondent was guilty of no act or omission under the rule, the demurrer to the evidence was properly overruled.

Wilson v. *C. B. & Q. R. Co.*, 317 Mo. 647, 296 S. W. 1017.

**Hawthorne* v. *International Great Northern Ry. Co.* (Tex. Civ. App.), 63 S. W. (2d) 243.

**Hawthorne* v. *International Great Northern Ry. Co.* (Tex. Civ. App.), 90 S. W. (2d) 895.

**International Great Northern Ry. Co.* v. *Hawthorne* (Tex. Comm. App.), 116 S. W. (2d) 1056.

II.

No Federal question of substance requiring an interpretation of the Federal Employers' Liability Act is presented, since respondent did not violate Rule 738 as alleged by petitioner, and no question of the application of the "primary duty rule" or the effect of *Tiller* v. *At-*

*No official reports.

lantic Coast Line R. Co., 318 U. S. 54, 63, 87 L. Ed. 610, 615, on that rule is involved.

Unadilla Valley Ry. Co. v. *Caldine*, 278 U. S. 139, 73 Law. Ed. 244, 49 Sup. Ct. 91.
Davis v. *Kennedy*, 266 U. S. 147, 69 Law Ed. 212, 45 Sup. Ct. 33.
Tiller v. *Atlantic Coast Line Railroad Co.*, 318 U. S. 54, l. c. 63, 87 Law Ed. 610, l. c. 615.
Southern Railway Co. v. *W. O. Gadd*, 233 U. S. 572, 34 Sup. Ct. 696.

III.

Respondent's Instruction No. 1, directing a verdict for the respondent, was properly given, because under the evidence respondent was guilty of no contributory negligence and petitioner's engineer and fireman were admittedly negligent.

State of Ohio ex rel. Seney v. *Swift & Co. et al.*, 260 U. S. 146, l. c. 149, 42 Sup. Ct. Rep. 22, l. c. 23.
International Great Northern Ry. Co. v. *Hawthorne* (Tex. Comm. App.), 116 S. W. (2d) 1056, l. c. 1058-59.
Unadilla Valley R. Co. v. *Caldine*, 278 U. S. 139, l. c. 141.
Davis v. *Kennedy*, 266 U. S. 147, 69 Law Ed. 212, 45 Sup. Ct. 33.
Frese v. *C. B. & Q. Ry. Co.*, 263 U. S. 1, 68 L. Ed. 131.
Unadilla Valley R. Co. v. *Dibble*, C. C. A. 2, 31 Fed. (2d) 239.

IV.

Petitioner's Instruction A, telling the jury that respondent "was guilty of negligence which contributed to cause whatever injuries he may have received," was properly

refused, because respondent did not violate Wabash Rule 738 as claimed by petitioner, and under the evidence petitioner's admitted negligence was the sole cause of respondent's injuries.

Young v. *Masci*, 289 U. S. 253, 261, 53 S. Ct. 599, 602, 58 L. Ed. 1145.
Rocco v. *Lehigh Valley R. Co.*, 288 U. S. 275, 53 Sup. Ct. 343.
(Authorities under Point I, *supra.*)

V.

The refusal of the Missouri court to grant a new trial because of the alleged mistake or perjury in the testimony of Dr. Casebolt was a matter of general local law, involving no interpretation of or right arising under the Federal Employers' Liability Act.

Central Vermont Railway Company v. *White*, 238 U. S. 507, 59 Law Ed. 1433, 35 Sup. Ct. 865, 866.
Louisville & N. R. Co. v. *Holloway*, 246 U. S. 525, 62 Law Ed. 867, 38 Sup. Ct. 379.

ARGUMENT.

I.

The Supreme Court of Missouri placed a proper interpretation upon Wabash Rule 738, and under such interpretation respondent fully performed all duties required of him.

Petitioner's sole basis for review rests upon the claim that the Supreme Court of Missouri placed an improper construction upon Wabash Rule 738. If the construction placed upon such rule by the Supreme Court of Missouri is correct, respondent performed his duty under said rule and could be guilty of no negligence whatsoever.

It is undisputed that the rules of petitioner placed upon the conductor and engineer equally and jointly the responsibility for the protection and safety of the train, the observance of rules and the vigilance and conduct of the men employed on the train. No rule placed any specific responsibility upon the head brakeman for the movement, operation, safety or protection of the train. (Rules 865, 99, 106, 835, R. 16-17.)

The next in position of responsibility after the conductor and the engineer was the fireman (R. 15, 16).

The only affirmative duty that Rule 738 placed upon respondent was to "remind the engineer of the contents of train orders, or the time of superior train which must be cleared, should there be occasion to do so." Respondent performed his duty under this rule when he called the engineer's attention to the train order and the engineer understood and replied that he had "plenty of time."

The engineer testified on behalf of defendant that after respondent had called his attention to the train order and he had told respondent that they had "plenty of time," respondent's only other duty was to "reach for a fusee and prepare himself for the duty of flagging in the event of an accident" (R. 63-64).

The petitioner claims that Rule 738 required respondent to go over the heads of his superiors, the engineer and fireman, and take charge of the locomotive by physical violence if necessary. The following part of the rule is made the basis of such claim:

> "Conductors, trainmen, yardmen, signalmen, operators and others whose duties are connected with the movement of trains, engines or cars, must familiarize themselves with the rules governing the duties of others as well as themselves, and must be prepared, in case of emergency, to act in any capacity to insure safety."

In denying that this was a proper construction of the rule, the Supreme Court of Missouri said:

> "We do not think appellant's construction of this rule is proper. This rule is plain and unambiguous. It requires all employees whose duties are connected with the movement of trains to familiarize themselves with the rules governing the duties of others as well as themselves, and to be prepared to act in any capacity to insure safety in case of an emergency. It is obvious that this rule means that if an employee is incapacitated to perform his duties due to sickness, death or other reasons, the next lower employee should step in and take over the incapacitated employee's duties. This rule does not mean that a subordinate employee should by force take over the duties of a superior employee. We have so ruled in construing a similar rule in the case of *Wilson* v. *Chicago, B. & Q. Railroad Co.,* 317 Mo. 647, 296 S. W. 1017. When respondent said to the engineer, 'John, we can't make it,' he called the engineer's attention to the train order, and the engineer understood, for his reply was to the effect that he could make it. Respondent thereby performed his duty under Rule 738 when he reminded the engineer of the contents of the train order" (R. 171-172).

It is obvious without citation of authority or argument that this construction of the rule is the only logical and sensible one. We call attention to the following additional factors in support of this:

1. The rule uses the words "*must be prepared,* in case of emergency, *to act* in any capacity to insure safety." (Italics ours.) The use of words "prepared to act" is significant. Had it been the purpose of the rule to require men "to act in any capacity to insure safety" without orders or directions from some superior official, the words "must be prepared * * * to" would have been omitted from the rule, and it would have unequivocally required them "to act."

2. Neither the engineer, the rear brakeman nor the respondent, the only members of the crew to testify, had ever heard of the interpretation for which the petitioner now contends.

The petitioner has cited no authority whatsoever to support the interpretation of the rule for which it contends in this Court. It has not shown wherein the opinion of the Supreme Court of Missouri in this respect conflicts with any decisions of this Court or any other court. Cases sustaining the Supreme Court of Missouri in its construction of the rule are:

Wilson v. *C. B. & Q. R. Co.,* 317 Mo. 647, 296 S. W. 1017.

**Hawthorne* v. *International Great Northern Ry. Co.* (Tex. Civ. App.), 63 S. W. (2d) 243.

**Hawthorne* v. *International Great Northern Ry. Co.* (Tex. Civ. App.), 90 S. W. (2d) 895.

**International Great Northern Ry. Co.* v. *Hawthorne* (Tex. Comm. App.), 116 S. W. (2d) 1056.

Taylor v. *A. T. & S. F. Ry. Co.,* 292 Ill. App. 457, 11 N. E. (2d) 610; cert. denied, 304 U. S. 560, 58 Sup. Ct. 942.

*No official reports.

II.

Since the Missouri Supreme Court properly held that respondent performed his full duty under Wabash Rule 738, no substantial Federal question is involved.

Petitioner seeks to have this Court grant a writ of certiorari on the theory that this case calls for the application of the so-called "primary duty rule," as set out in *Unadilla Valley Ry. Co.* v. *Caldine,* 278 U. S. 139, 73 Law Ed. 244, 49 Sup. Ct. 91; *Davis* v. *Kennedy,* 266 U. S. 147, 69 Law Ed. 212, 45 Sup. Ct. 33, and other cases.

Petitioner in all courts has conceded and admitted that the engineer and conductor were negligent in disregarding specific orders to wait at a given point until the train moving in the opposite direction had passed. The sole basis for seeking to apply the "primary duty rule" is the claim that Wabash Rule 738 placed a duty upon respondent to usurp the engineer's position and stop the train, and that his failure to do so was the sole and primary cause of his injury. It is obvious that the construction placed upon the rule by the Missouri Supreme Court is correct, and respondent performed everything required of him under the rule, so that the "primary duty rule" has no application.

Petitioner seeks to inject a "Federal question of substance" into the case on the theory that certain language employed by this Court in the case of *Tiller* v. *Atlantic Coast Line Railroad Co.,* 318 U. S. 54, l. c. 63, 87 Law Ed. 610, l. c. 615, is in conflict with prior decisions of this Court applying the "primary duty rule." Since the respondent in this case fully performed all that was required of him under the rule in question, it follows that the question of whether "violation of a company rule became assumption of risk" is not here involved. No

question of the interpretation of the Federal Employers' Liability Act as amended is at issue in the case. The only questions involved are those of general law, and in view of the proof, the request that the trial court take the case from the jury was absolutely without merit. The petitioner fails to meet the requirements of Sec. 237 of the Judicial Code of the United States as amended, Sec. 344, U. S. C. A. It does not reveal that "a Federal question of substance" is involved, as required by Rule 38, Revised Rules of the Supreme Court of the United States.

This Court will not review a case where the Federal questions presented are trivial. *Southern Railway Co.* v. *W. O. Gadd,* 233 U. S. 572, 34 Sup. Ct. 696.

III.

The Supreme Court of Missouri properly upheld respondent's Instruction No. 1, because petitioner admitted that the conductor and engineer were negligent and no issue of proximate cause was raised by the pleadings or the evidence.

Instruction No. 1, given by the trial court on behalf of plaintiff, is as follows:

> "Under the law and the evidence it is your duty to render a verdict for Mr. Williamson and against the Wabash Railroad Company, and determine and fix the amount of recovery in accordance with other instructions herein" (R. 129-130).

The only objection made at the time this instruction was offered is as follows: "We object to that requested instruction, Instruction No. 1, because it fails to take into consideration the question of proximate cause" (R. 130).

Petitioner asserts that this instruction is erroneous because respondent's conduct in violating Rule 738 was the

sole cause of his injuries. This question has been completely disposed of under Points I and II, *supra.*

In addition, petitioner claims that it ignores the issue of whether respondent could have seen the approaching train in time to require the engineer to stop and avoid respondent's injuries. This issue was not injected into the case in the trial court, but was raised for the first time on appeal. In passing on this assignment of error, the Missouri Supreme Court said:

> "We have already held that respondent's injuries were not the result of his violating any rule of the company. The record convinces us that that was the sole contention of appellant; that is, that respondent violated rule 738. Appellant's only objection to this instruction when it was given was that it failed to take into consideration the question of proximate cause. * * * Likewise, appellant did not try the case on the theory that respondent failed to perform his lookout duty by observing the oncoming train in time to avoid the collision. It was not disputed that he was on the seat in front of the fireman looking ahead and the train was on the straight track going into the curve when respondent saw the reflection of the headlight of the passenger train and immediately yelled, 'Headlight'. Since the case was tried on a theory in which the question of proximate cause was not an issue, it was unnecessary to submit that issue to the jury" (R. 172-173).

Petitioner has cited no authority to sustain its position that this holding is in conflict with any holdings or decisions of this or any other Court. This Court has held, "Generally, at least, suitors may not maintain a position here which conflicts with that taken below * * ". *State of Ohio ex rel. Seney* v. *Swift & Co. et al.,* 260 U. S. 146, l. c. 149, 43 Sup. Ct. Reporter, 22 l. c. 23. Petitioner did not contend below and does not contend in this Court that

the failure of respondent to see the oncoming engine in time to cause his engineer to stop and avoid the collision constituted the direct primary cause of his injuries. Petitioner did not offer to submit this to the jury as an issue of fact (R. 133-136).

Under the authorities cited by petitioner, the sole proximate cause of the collision as a matter of law was the failure of the conductor and engineer to do what they knew they ought to do.

In *Unadilla Valley R. Co.* v. *Caldine*, 278 U. S. 139, l. c. 141, this Court said:

> "A failure to stop a man from doing what he knows that he ought not to do, hardly can be called a cause of his act."

In denying recovery to the personal representatives of deceased engineers who proceeded in violation of positive train orders, this Court and the district courts have held that the failure of other employees to prevent their violation of rules *cannot even constitute contributing acts of negligence.*

> *Davis* v. *Kennedy*, 266 U. S. 147.
> *Frese* v. *C. B. & Q. Ry. Co.* 263 U. S. 1.
> *Unadilla Valley Ry. Co.* v. *Dibble*, C. C. A. 2, 31 Fed. (2d) 239.

The above cases are authority for the holding in the present case that the admitted joint and concurrent negligence of the engineer and the fireman was the sole proximate cause of the casualty.

In the similar case of *International Great Northern Railroad Co.* v. *Hawthorne* (Tex. Comm. App.), 116 S. W. (2d) 1056, l. c. 1058-59, cited *supra*, it was held that when

the conductor admittedly misread his time table, and failed to take a sidetrack to avoid a head-on collision with an approaching scheduled train, and the fireman was injured when he jumped from the locomotive before the collision, it would be proper to instruct the jury that defendant was guilty of negligence proximately causing the injuries as a matter of law.

IV.

The Supreme Court of Missouri correctly held that petitoner's Instruction A was properly refused, because the admitted negligence of the conductor and engineer was the primary and sole cause of the collision.

Petitioner's Instruction A, refused by the court, sought to tell the jury that respondent "was guilty of negligence which contributed to cause whatever injuries he may have received." Petitioner contends that this instruction should have been given because respondent violated Rule 738. It has heretofore been pointed out that respondent performed all required of him under this rule and was guilty of no negligence.

Petitioner for the first time now claims in this Court that respondent was guilty of negligence as a matter of law in failing to see the approaching train in time to require the engineer to stop and avoid his injuries. This question was raised neither in the trial court nor in the Supreme Court of Missouri (R. 172). It will, therefore, not be considered in this Court. *Young* v. *Masci,* 289 U. S. 253, 261, 53 S. Ct. 599, 602, 58 L. Ed. 1145.

Under Point III, *supra,* it has been pointed out that respondent was guilty of no negligence that entered into and formed part of the proximate cause of his injuries. If it could be said that there was any evidence of negligence on his part, it would have been an issue of fact for

the jury and not a question of law for the court. *Roc* v. *Lehigh Valley R. Co.*, 288 U. S. 275, 53 S. Ct. 343, a authorities cited *supra* under Point I. Petitioner, aga has cited no authority to sustain its position on t point.

V.

Petitioner's assignment of error as to the Missouri cou failure to sustain defendant's motion for new trial because the testimony of Dr. M. B. Casebolt does not raise a quest reviewable in this Court.

Petitioner seeks to charge the Missouri court with er because it refused to grant a new trial for alle mistake or perjury in the testimony of one of respo ents doctors, M. B. Casebolt. This assignment involves construction of the Federal Employers' Liability Act, raises a question of general local law. Such a question not be considered by this Court. In *Central Vermont R way Company* v. *White*, 238 U. S. 507, 59 Law Ed. 1 35 Sup. Ct. 865, 866, this Court said:

> "Some of the assignments in the present case re to matters of pleading; others to the admissibility evidence, to the sufficiency of exceptions, and various rulings of the trial court which involve construction of the Employers' Liability Act, which, therefore, cannot be considered on writ error from a state court. *Seaboard Air Line R. C Duvall*, 225 U. S. 477, 486, 56 L. Ed. 1171, 1175 Sup. Ct. Rep. 790."

See also:

> *Louisville & N. R. Co.* v. *Holloway*, 246 U. S. 62 Law Ed. 867, 38 Sup. Ct. 379.

The Supreme Court of Missouri fully considered this assignment, determined it according to the local law, and its ruling on this discretionary matter is final and conclusive (R. 174-175).

Wherefore, respondent respectfully submits that the opinion and judgment of the Supreme Court of Missouri is correct in every respect, no Federal question of substance is involved, and the petition should be summarily denied.

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